IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel. W. A. DREW EDMONDSON, in his capacity as ATTORNEY GENERAL OF THE STATE OF OKLAHOMA and OKLAHOMA SECRETARY OF THE ENVIRONMENT C. MILES TOLBERT, in his capacity as the TRUSTEE FOR NATURAL RESOURCES FOR THE STATE OF OKLAHOMA,	)	
Plaintiff,	)	
vs.	)	**05-CV-0329 GKF-SAJ**
TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC., COBB-VANTRESS, INC., AVIAGEN, INC., CAL-MAINE FOODS, INC., CAL-MAINE FARMS, INC., CARGILL, INC., CARGILL TURKEY PRODUCTION, LLC, GEORGE'S, INC., GEORGE'S FARMS, INC., PETERSON FARMS, INC., SIMMONS FOODS, INC., and WILLOW BROOK FOODS, INC.,	)	
Defendants.	)	

PETERSON FARMS, INC.'S RESPONSE TO PLAINTIFFS' MOTION FOR PROTECTIVE ORDER REGARDING CONDUCT OF 30(B) (6) DEPOSITIONS

Defendant Peterson Farms, Inc. ("Peterson") hereby submits its Response to *Plaintiffs' Motion for Protective Order Regarding Conduct of 30(b)(6) Depositions* ("Plaintiffs' Motion") (Dkt. No. 1309). Peterson urges the Court to deny Plaintiffs' Motion as premature and without adequate legal or factual basis. In support of its Response, Peterson states the following:

SUMMARY

On August 17, 2007, the Cargill Defendants propounded five 30(b)(6) notices to Plaintiffs ("Cargill notices"). Each notice sought to depose a representative of the Plaintiffs on specific and distinct topics that on their face related only to the Cargill Defendants. Rather than offer designees in response to the Cargill notices, Plaintiffs filed the instant Motion seeking to

force Peterson to conduct its examination of Plaintiffs on Peterson-specific issues under the auspices of the Cargill notices. Peterson views the Motion to Compel filed by the Cargill Defendants seeking an Order directing Plaintiffs to designate witnesses to testify in response to the Cargill-specific notices as a dispute solely between the Cargill Defendants and Plaintiffs. (Dkt. No. 1270.) Nonetheless, without any attempt to confer with Peterson about their intention to seek relief from the Court, Plaintiffs have dragged Peterson into the dispute by virtue of their Motion, which seeks to severely undermine Peterson's right to prepare and conduct its defense as it sees fit.

Peterson has not yet served 30(b)(6) deposition notices on the Plaintiffs. Peterson has chosen, as is its right, to hold off its examination of Plaintiffs on their specific claims against Peterson until Plaintiffs fulfill their duties of disclosure. Peterson's strategies have no bearing on, nor should they prejudice the right of any other Defendant to prosecute its defense as it deems best. Likewise, the decision by the Cargill Defendants to obtain binding testimony from Plaintiffs about any evidence they possess to support their claims against the Cargill Defendants at this time cannot form the basis for compelling Peterson to expend its opportunity to examine the Plaintiffs before Peterson is prepared to do so. Plaintiffs' Motion is based on hypothetical scenarios, possibilities and speculation, supported only by their representation of how they believe their designees will testify in response to the Cargill Defendants' questioning. As such, Plaintiffs' Motion fails to set forth any facts to sustain their burden to show good cause, and therefore, their Motion should be denied.

ARGUMENT

Plaintiffs have improvidently sought to embroil Peterson in a discovery dispute arising solely from their unjustified refusal to appear at 30(b)(6) depositions noticed by the Cargill

Defendants. Peterson has not propounded any notices to examine Plaintiffs on their claims against Peterson. The only notices at issue in Plaintiffs' Motion are those propounded by the Cargill Defendants that are drafted precisely to reach only matters involving Plaintiffs' claims against those specific Defendants. Rather than simply comply with the notices before them, Plaintiffs now ask for an order of the Court that would effectively dictate how Peterson will defend this case. Plaintiffs desire the Court to direct all of the Defendants to appear and examine Plaintiffs' designees on their own topics at the time of the Cargill depositions. Plaintiffs' requested relief is nonsensical, which if granted, would have the following consequences:

First, Peterson cannot examine Plaintiffs about their claims against Peterson under the topics contained within the Cargill notices. Thus, the relief Plaintiffs seek would require Peterson to issue its own notices, which may be broader or narrower, but certainly different from those crafted by the Cargill Defendants.

Second, given that Peterson has not determined its topics of interest, and certainly has not served Plaintiffs with notices, the possibility exists that Peterson's notices may implicate different designees than those Plaintiffs select to address the Cargill topics. It is wholly improper for Plaintiffs to ask the Court to speculate as to whether the designees will be the same under as yet unwritten notices.

Third, Plaintiffs seek to dictate the timing and manner of the separate Defendants' defense. If the Court sustains Plaintiffs' Motion, either Peterson will be forced to take Plaintiffs deposition before it deems advisable to meet its own interests, or the Cargill Defendants will be delayed until the last of the Defendants determines that the time is right to proceed with the depositions. Despite Plaintiffs' attempt to cast their claims against an industry, Defendants are situated differently in this action, which affects their individual approaches to the defense of

these claims. Some companies have very few poultry growers under contract in the Watershed, while some have a significantly greater number of contracts. Some companies have breeder, pullet and broiler chickens in the Watershed, while others have turkeys or laying hens. Some have poultry operations managed by company personnel, while others do not. The dispersion of poultry operations in the Watershed is not homogeneous by geographic area, time of operation, or the relationship to the Defendants, which are factors Plaintiffs must contemplate to present their claims against the individual Defendants. Hence, each Defendant has a right protected by the federal rules to prepare its defense as it and its counsel deem appropriate.

Plaintiffs seek for the Court to bar Peterson from taking 30(b)(6) depositions on its own timing under the guise that allowing Peterson to take a 30(b)(6) deposition of the Plaintiffs at a separate time than the Cargill Defendants would be "plainly oppressive, unduly burdensome and expensive." (Dkt. # 1309 at ¶ 5). This claim fails undeniably from a lack of factual support.

Courts have held that an order that prevents a deposition is a "drastic action," which is disfavored. *Horsewood v. Kids "R" Us*, 1998 WL 526589, at * 5 (D. Kan. Aug. 13, 1998); *see also Harris v. Euronet Worldwide, Inc.*, 2007 WL 1557415, at * 1 (D. Kan. May 29, 2007). "While the [c]ourt may grant a protective order prohibiting the taking of a deposition when it believes that the information sought is wholly irrelevant…the normal practice…is to deny motions that seek to entirely bar the taking of a deposition." *Miles v. Wal-Mart Stores*, 2007 WL 2069905, at *2 (W.D. Ark. July 17, 2007) (quoting *Horsewood*, 1998 WL 526589 at *5). The Plaintiffs' attempt to bar Peterson from undertaking its own noticed 30(b)(6) is not ripe for determination as evidenced by Plaintiffs' complete failure to set forth any factual basis to support their claim of prejudice. Ultimately, Plaintiffs have failed entirely to show good cause for their

alleged assertions and prematurely seek to limit Peterson's discovery rights based solely upon pure speculation.

I. PLAINTIFFS' MOTION AGAINST PETERSON IS PREMATURE AND PURELY SPECULATIVE

A. Plaintiffs' Motion is Premature as Peterson Has Not Served a 30(b)(6) Notice

Plaintiffs' Motion argues that any 30(b)(6) notice served by another Defendant would be duplicative and therefore they would "in all likelihood be unnecessarily subjected to multiple, repetitive 30(b)(6) depositions on issues that substantially overlap among the various Defendants…." (Dkt. 1309 at ¶ 3). Given that Peterson has not propounded any 30(b)(6) notices, Plaintiffs are, in effect, seeking an advisory ruling to prevent an as yet unrealized event based solely upon pure speculation as what information the other Defendants will seek and how its witnesses will testify in response thereto. Plaintiffs contend that Defendants have engaged in a joint defense of Plaintiffs' claims and that Plaintiffs' claims are common amongst the Defendants. (Dkt. 1309 at ¶3). While it may be true that Defendants will cooperate on certain aspects of the defense, there is little question that each Defendant will vigorously and independently prosecute its own defense against Plaintiffs' baseless contentions against them. The fact that Plaintiffs have chosen to prepare their case as if it were against an industry, employing undifferentiated evidence rather than evidence to prove that each Defendant contributed to the harm they allege may ultimately prove fatal to their cause, but it is irrelevant to the proper scope of discovery. Hence, Plaintiffs' naked assertion that their witnesses will testify the same when asked about the evidence against each Defendant is a matter the Defendants are entitled to ferret out in the depositions, and therefore it is not an issue to be resolved by way of a premature motion for a protective order. As one federal court held, moving for a protective order to prevent 30(b)(6) depositions that have not been noticed "is premature and does not support [a]

request for a protective order." *Telecomm Technical Services, Inc. v. Siemens Rolm Communications, Inc.*, 1997 WL 34639048, at 2 (N.D. Ga. Sept. 15, 1997).

Regardless of whether Plaintiffs assert that their claims against Defendants are common, each Defendant has the right to test those claims as they specifically relate to that Defendant. Plaintiffs have asserted claims under CERCLA, RCRA, common law, nuisance, trespass and other legal theories alleging that each Defendant has engaged in conduct that has caused damage to the Illinois River Watershed. Plaintiffs have not alleged any "aggregate" theory of liability that would impute the actions of one Defendant in this matter against another. Hence, Plaintiffs must prove with specific evidence that Peterson has engaged in conduct that contributed to the harm they allege. Plaintiffs cannot rely upon any specific evidence it may be able to prove against another Defendant in this matter as proof of Peterson's liability.

Thus, each Defendant has the right to ask questions of Plaintiffs' designated representatives pursuant to their own specific 30(b)(6) topics. Plaintiffs' Motion is, therefore, premature as it seeks to have the Court speculate and assume that each Defendant will submit the same topics to the Plaintiffs in their respective 30(b)(6) notice as those contained in the Cargill notices, and that Plaintiffs' designees will offer the same testimony in response to each Defendants' inquiry. Until such time as Peterson serves Plaintiffs with 30(b)(6) notices, the issue is not ripe for the Court's consideration, and therefore, Peterson respectfully suggests the Court should deny Plaintiffs' Motion.

B. Plaintiffs Have Not Made A Showing of Good Cause for Their Protective Order Against Peterson

A party seeking a protective order bears the burden to demonstrate good cause for the relief it seeks. *See Sentry Ins. v. Shivers*, 164 F.R.D. 255, 256 (D. Kan. 1996). It is solely within the Court's discretion as to whether it enters a protective order based upon the showing made by

the party seeking the order. Fed. R. Civ. P. 26 (c); *see also Thomas v. Int'l Business Machines*, 48 F.3d 478, 482 (10th Cir. 1995). Good cause is shown when the party seeking the order submits "a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements." *Horsewood*, (cite westlaw cite) (quoting *Gulf Oil v. Bernard*, 452 U.S. 89, 102 n. 16 (1981).

As stated above, Peterson has not yet submitted any notices to the Plaintiffs pursuant to Fed. R. Civ. P. 30(b)(6). Thus, despite the Plaintiffs' alleged concerns as stated in their Motion, Plaintiffs' have failed to provide any "particular and specific demonstration of fact" as required to support the relief they seek. Rather, Plaintiffs' rely exclusively on their conclusory assertion that the possibility may arise if the Court allows Defendants to notice and take their own 30(b)(6) depositions they will be subject to "repetitive depositions," which will "substantially overlap" resulting in oppression, undue burden and expense. This is pure conjecture, and therefore, Plaintiffs have no factual basis for such claims. Plaintiffs' inability to meet their burden of proof under Fed. R. Civ. P. 26(c) derives logically from their premature filing. Since no 30(b)(6) depositions have been taken and only the Cargill Defendants have served deposition notices, it is impossible for Plaintiffs to substantiate their claims of burden and oppression.

Consequently, Plaintiffs can offer no evidentiary support that Peterson will ask duplicative questions of those propounded by the Cargill Defendants. Moreover, Plaintiffs cannot demonstrate that any alleged duplicative questions would result in substantially the same answer for each Defendant. Without a 30(b)(6) deposition notice from Peterson outlining the specific topics, Plaintiffs' claims have no factual or evidentiary basis and amount to bare *ipse dixit*. Thus, Plaintiff's Motion fails to meet the burden for such "drastic action" as set out in Fed. R. Civ. P. 26(c) and *Horsewood*. *See id*.

C. Plaintiffs' Have Failed To Meet and Confer With Peterson

Contrary to Plaintiffs' representations, they did not fulfill their obligation under LCvR 37.1 to meet and confer with Peterson prior to filing the instant Motion. LCvR 37.1 requires Plaintiffs to meet and confer in good faith to resolve any disputes pursuant to Fed. R. Civ. P. 26 prior to filing a motion seeking relief with the Court. Although Plaintiffs submitted various letters from the Defendants claiming they complied with the local rule, such communication is not sufficient to meet the standard of good faith. Plaintiffs' failure to advise Peterson that they were prepared to file a Motion for Protective Order or to take any steps to confer with Peterson's counsel prior to filing its Motion lacks a "sincere attempt to resolve differences" as required by LCvR 37.1. Thus, the Court should deny Plaintiffs' Motion because Plaintiffs have failed to comply with the local meet and confer rule in addition to the reasons stated previously.

II. THE RELIEF REQUESTED BY PLAINTIFFS HAS NO RATIONALE BASIS UNDER FEDERAL LAW AND WOULD RESULT IN PREJUDICE TO PETERSON

A. Each Defendant Has the Right to Take Its Own 30(b)(6) Depositions

The Advisory Committee's Notes to Fed. R. Civ. P. 30(d)(2) acknowledge that special circumstances exist when a case involves multiple parties, which require a court to look at the limitations on depositions set forth in the text of the Rules. The Notes further acknowledge that each party has a need and right to examine a witness. In this case, Plaintiffs' claims not only involve complicated issues of law, but also involve multiple Defendants. Defendants in this case have not conducted business as a homogenous unit as Plaintiffs would have this Court believe. Rather, Defendants are distinct corporations, which manage their operations and day to day business in individual and distinct ways. Plaintiffs' Motion evidences their strategy to present their case as if Defendants were a single party, but through the relief they seek, they attempt to

transform their view of the case into a substantive limitation on the individual Defendants' rights to discovery. For example, Plaintiffs seek an order which requires Peterson to appear at the Cargill Defendants' depositions and shoe horn its examination into the topics identified in the Cargill Defendants' 30(b)(6) deposition notices. Requiring Peterson to participate in depositions on topics that were identified by another Defendant would result in significant prejudice to and eviscerate Peterson's ability to prosecute its defense. Likewise, forcing Peterson to develop and serve its own 30(b)(6) notice at this time to coincide with the Cargill notices puts Peterson in the position of taking its shot at Plaintiffs before it is prepared to do so.

Notwithstanding the complexity of this case, Peterson is not interested in recreating the wheel or incurring significant expense to obtain Plaintiffs' testimony on the basis for their claims against Peterson (if any). It does not serve Peterson's interest to ask duplicative questions of Plaintiffs; however, simply because Plaintiffs assert that their evidence is the same with regard to every Defendant does not bar Peterson's right to make a sworn record of Plaintiffs' positions as they relate to Peterson. This is the purpose 30(b)(6) depositions serve, and they must be allowed to unfold as the questions are asked.

Peterson respectfully suggests that the proper course of action for the Court is to deny Plaintiffs' Motion. Once Peterson serves Plaintiffs with its 30(b)(6) notices, if Plaintiffs can substantiate that the topics are duplicative of those asked by another Defendant, they can seek relief if the requisite conference with Peterson fails to net a resolution.

B. Multiple 30(b)(6) Notices are Appropriate under Federal Law

In *Canal Barge Company v. Commonwealth Edison Co.*, the Northern District of California recognized that it was permissible for the defendant to serve six separate 30(b)(6) notices covering distinct subject matters. *See Canal Barge Co. v. Commonwealth Edison Co.*,

2001 WL 817853, at *3. The *Canal* court held that pursuant to the Advisory Committee's Notes to Rule 30(d)(2), when a corporation designates more than one representative to answer the topics identified within the 30(b)(6) notice served, the one day limit applies separately to each designee. The *Canal* case involved only one plaintiff and one defendant. Therefore, it is not unreasonable to assume that if it is permissible for one defendant to serve six deposition notices in a simple contract dispute then it is more than reasonable to allow multiple defendants to submit their own 30(b)(6) notice(s) on topics which are specifically related to that defendant.

CONCLUSION

The rules of discovery protect a party's right to inquire and evaluate the claims brought against it. Although Peterson anticipates serving at least one 30(b)(6) notice inquiring into the basis for Plaintiffs' claims of liability, Plaintiffs improperly seek to have this Court enter an advisory order restricting Peterson's ability to develop and inquire on the topics of its choosing at timing of its choosing before the dispute has arisen. Because Plaintiffs have failed to show any factual or evidentiary basis for the discovery restrictions they seek, Peterson respectfully requests the Court deny *Plaintiffs' Motion for Protective Order* as premature and without legal or factual basis.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 23rd day of October 2007, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System on September 11, 2007:

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